BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ADAM HENDRICKSON, Claimant, v. DEATLEY CRUSHING COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 02-514455** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed June 16, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Lewiston, Idaho, on October 25, 2005. Claimant was present and represented by Scott Chapman of Lewiston. E. Scott Harmon of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record was held open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs[1] and this matter came under advisement on April 20, 2006.

[1] Defendants request that Claimant's initial brief and reply brief be stricken because Claimant's initial brief was untimely filed. The Second Order Amending Briefing Schedule gave Claimant until February 21, 2006, to file his initial brief; it was not filed until March 2, 2006, and no request for an extension was made. Defendants' motion to strike is granted and Claimant's briefs are stricken as untimely and will not be considered.

ISSUE

By agreement of the parities, the sole issue to be decided is the extent, if any, of Claimant's permanent partial disability (PPD) in excess of his permanent partial impairment (PPI).[2]

CONTENTIONS OF THE PARTIES

Simply stated, Claimant contends that he is entitled to disability in excess of his impairment and Defendants contend he is not.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Employer's Safety Director, Michael Osburn, taken at the hearing;

2. Claimant's Exhibits 1-13 admitted at the hearing;

3. Defendants' Exhibits A-T admitted at the hearing; and

4. The post-hearing depositions of: Steven E. Ozeran, M.D., with two exhibits taken by Claimant on January 5, 2006, and Timothy J. Flock, M.D., taken by Claimant on January 9, 2006.

Defendants' objection at page 31 of Dr. Ozeran's deposition is sustained as well as their objection at page 8 of Dr. Flock's deposition.

After having considered all the above evidence and Defendants' brief, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

[2] In their post-hearing brief, Defendants assert, for the first time, that Claimant received an overpayment of total temporary disability benefits and such overpayment would be subtracted from any PPD awarded. Because such alleged overpayment was not an issue raised pre-hearing, Claimant has had no opportunity to respond. Due process requires that Defendants' assertion regarding the alleged overpayment will not be addressed in this decision.

FINDINGS OF FACT

1. Claimant was 25 years of age at the time of the hearing and resided in Clarkston, Washington.

2. On July 18, 2002, Claimant was employed as a plant operator at one of Employer's mobile rock crushing operations in Richland, Washington, when a 3,000 pound splash plate or "chunk of steel" Claimant was cutting out of the rock crusher came loose and fell on his right foot, resulting in a severe crushing injury.

3. Claimant's post-injury medical treatment was long and complicated and spanned over two and a half years, and he was slow to recover. His injury resulted in a partial amputation of his great right toe, repeated surgeries to debride necrotic tissue in a wound that developed in the ball of his foot, hyperbaric oxygen treatments, physical therapy, and treatment for osteomyelitis and other infections. Claimant was left with no padding or soft tissue in the ball of his right foot. Orthotic footwear proved unsuccessful.

4. Claimant was gradually able to return to work for Employer in a light duty position first working a few hours a week until he was able to return to a full schedule in early 2005.

5. On November 4, 2004, Robert C. Colburn, M.D., an orthopedic surgeon practicing in Lewiston, performed an IME at Defendants' request. Dr. Colburn summed up his conclusions and diagnosis as follows:

> 1) Severe crushing injury to the right forefoot with comminuted fracture of the proximal phalanx of the big toe, right, with compromised circulation to the big toe and plantar surface skin. Status is post multiple debridements, intensive and hyperbaric wound care, and intensive treatment for osteomyelitis as complications of the injury. This diagnosis and the subsequent complications are related to the crush injury of 07/18/02.
>
> 2) Chronic right forefoot pain secondary to the above.

Defendants' Exhibit R, p. 342.

6. Dr. Colburn rated Claimant at 10% whole person PPI and imposed restrictions to be discussed later.

DISCUSSION AND FURTHER FINDINGS

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

7. At the time of the hearing, Claimant was working full time for Employer as a welder/fabricator earning $15.90 an hour. He cannot return to his time-of-injury job as a plant operator where he was earning $17.30 an hour. He has no plans to find other work and would like to eventually work into management and retire from Employer. Michael Osburn, Employer's Safety Director, testified that Claimant is an excellent employee and Employer has

no plans to let him go and expects Claimant to receive "top pay" of $17.05 by the end of the year.

8. Claimant completed the 11th grade and received his GED from Lewis-Clark State College in 1998. He has worked as a farm worker, farm equipment operator, and welder/fabricator. He is currently an apprentice welder.

9. Dr. Flock testified that Claimant should limit the time on his feet to four hours a day, install a padded shoe insole into his right boot, and work to tolerance without fear of further damage. Dr. Colburn imposed restrictions of occasionally lifting and carrying up to 50 pounds with frequent lifting and carrying limited to 20 pounds. Continuous standing and walking should not exceed an hour at a time without a 10-15 minute rest period. Crouching and walking on uneven ground should be limited and Claimant should only rarely climb ladders.

10. Claimant, to his credit, was able to return to his time-of-injury employment, although not at the plant operator position. However, he testified that at the end of the workday, his right foot ". . . feels like a piece of hamburger." Hearing Transcript, p. 35.

This case is somewhat similar to *Kolar v. JUB Engineers and American Manufacturers Insurance Company*, 2005 IIC 0185. There, Claimant received a serious degloving injury to his thigh and, like Claimant here, had a long and complicated course of recovery. He was eventually able to return to work at the same type of work he was performing at the time of his injury, but with a different employer. At the time of the hearing, he was making more money than at the time of his injury. Claimant argued that his current employer was sympathetic and Claimant would be at a substantial disadvantage competing against healthier workers should he be laid off or fired. Claimant's vocational expert opined that while Claimant did not suffer any wage loss,

he did lose between 36 and 37.7 percent of his pre-injury labor market. The Commission disagreed:

> Claimant's actual and present ability to engage in gainful activity has not been affected by his PPI and pertinent nonmedical factors as he continues to work for the City of Jerome at a higher wage with the opportunity for future wage increases. There is no credible evidence that Claimant's employment will end. Therefore, there is no reason to presume that Claimant's probable future ability to engage in gainful activity will be reduced by his PPI and pertinent nonmedical factors.

Id., p. 19.

11. Under certain circumstances, an employee's probable future wage increases can be considered without running into the problems of speculation and uncertainty. If an employee is performing a different job post-injury than he was pre-injury, to consider probable future wage increases would be speculative and not supported in law. *See, Reiher v. American Fine Foods,* 126 Idaho 58, 878 P.2d 757 (1994). Here, contrary to Defendants' argument, Claimant is currently performing fabrication/welding work having different duties and wages than his time-of-injury job as a plant operator. His time-of-injury wage was $17.30 an hour. He currently makes $15.90 an hour, a $1.40 difference. While Claimant **may** receive raises as testified to by Mr. Osburn, to consider such raises would contravene the teachings of *Reiher*. Here, there is no vocational evidence that Claimant has lost any percentage of his pre-injury labor market and the Referee is disinclined to speculate on such loss, if any.

12. The Referee finds that, based on the statutory factors and Claimant's wage loss through the time of the hearing, he has incurred PPD of 15% of the whole person inclusive of his PPI.

CONCLUSION OF LAW

1. Claimant has proven his entitlement to PPD of 15% inclusive of his 10% whole person PPI.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __6th __ day of June, 2006.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __16th __ day of __June__, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

SCOTT CHAPMAN
PO BOX 446
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___/s/_____

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